

**Fair Information Practices
Regulation of Access to Personal Data**

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SECTION

104.000

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104.010: Regulation of Access to Personal Data

Except as provided in section 104.020, the department shall not permit access to personal data to any person other than an employee of the department or the data subject unless such access is authorized by state or federal statute or regulation consistent with the purposes of these regulations or is approved by the data subject whose personal data is sought.

104.020: Accuracy of Released Personal Data

Where access to personal data is authorized pursuant to this Chapter, with or without the approval of the data subject, the department shall release such data in the most accurate form possible. If the department has reason to believe that personal data may be inaccurate, it shall either verify such data prior to release or state at the time of such release that the data may be inaccurate.

104.030: Exception for Medical or Psychiatric Emergencies

Where release of personal data is not generally authorized by statute or regulation, medical or psychiatric data may be made available to a physician treating a data subject, upon the request of said physician, if a medical or psychiatric emergency arises which precludes the data subject giving approval for the release of such data; provided, however, that the department shall give notice of the fact of such release to the data subject upon termination of the emergency.

104.040: Approval by Data Subject

The approval of a data subject prior to granting access as required by section 104.010 may be granted in writing or orally, including by telephone; provided, that the department shall make reasonable efforts to verify the identity of the data subject; and, provided further, that the department shall, if no written consent is given, make a notation of an oral approval and shall file such notation with the personal data held.

104.050: Response to Compulsory Legal Process

The department shall, as required by G.L. c. 66A, § 2 (k), maintain procedures to ensure that no personal data are made available from its personal data systems in response to a demand for data made by means of compulsory legal process unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed. To fulfill this requirement, the procedures of the department shall include:

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- (A) an explanation to department personnel of the service of subpoenas under Rule 45 of the Rules of Civil Procedure (for civil litigation in state and federal courts), G.L. c. 233, §§ 1-6 (for criminal litigation in state courts), Rule 17 of the Rules of Criminal Procedure for the United States District Courts (for criminal litigation in the federal courts) and G.L. c. 30A § 12 (for adjudicatory proceedings before state agencies);
- (B) a requirement that service of a subpoena which names a department officer or employee will be accepted on behalf of said officer or employee by any other individual only if such acceptance occurs at least three business days prior to and not including the day on which the attendance of said officer or employee is demanded;
- (C) instructions to attempt in all cases to negotiate with the person causing the subpoena to be served with a view to avoiding the appearance or, if an appearance is necessary, narrowing the scope of the subpoena to those matters truly required; and
- (D) a requirement that the data subject be notified no later than the next business day following the day on which the subpoena is served.

104.060: Scope of Sections 104.060 through 104.110

Neither G.L. c. 66A nor these regulations alter the requirements of the Freedom of Information Act, G.L. c. 66, § 10, that agencies must grant access by members of the public to all public records. An agency's determination of whether or not to release a record often hinges on whether or not that record is a public record.

Among the exemptions listed in the definition of "public record" is one for records the disclosure of which may constitute an unwarranted invasion of personal privacy. The rules and examples set out in this Chapter are intended to aid agencies in identifying such invasions as part of the process of identifying public records.

104.070: Access to Public Records

Pursuant to G.L. c. 66, §10, an agency must grant access upon request, without the consent of the data subject, to any personal data which is a public record as defined in section 101.090. Each agency must establish a procedure for resolving questions within such agency regarding the identification of public records. Such procedure must be consistent with AB 74-17, Regulations on Freedom of Information, promulgated by the Commissioner of Administrative pursuant to G.L. c. 7, § 3 and 4.

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104.080: Unwarranted Invasion of Personal Privacy: General Rule

If the disclosure of personal data may constitute an unwarranted invasion of personal privacy, the personal data is not a public record. In general, disclosure of personal data may constitute an unwarranted invasion of privacy when:

- (A) the personal data is not of common knowledge, not of public record, and not in public view;
- (B) disclosure will more likely than not be embarrassing or offensive to the data subject; and
- (C) there is no legitimate public interest in disclosure sufficient to outweigh the potentially embarrassing or offensive nature of the disclosure.

104.090: Unwarranted Invasion of Personal Privacy: Examples

In implementing section 104.080, the department shall consider the examples in the remainder of this Chapter.

104.100: Disclosures Not Constituting an Unwarranted Invasion

Disclosure to the public of personal data in the following situations is not normally an unwarranted invasion of privacy:

- (A) Disclosure of an unverified, citizen's complaint concerning the professional conduct of a health professional.
- (B) Disclosure of a license survey report which includes evaluative materials concerning the professional conduct of a health professional.

Explanation: Clauses (A) and (B) of section 104.080 may be satisfied in examples (A) and (B) above. However, the public has a legitimate interest in learning of improper professional conduct which may affect the quality of health care provided to the public, and this public interest in disclosure will normally outweigh the potentially embarrassing nature of the disclosure. In order to disclose the personal data in the most accurate form possible, the agency should accompany the disclosure of an unverified complaint with an explanation that the complaint is unverified and, if an investigation is planned or in progress, the date by which such investigations will be completed.

- (C) Disclosure of an intra-agency memorandum which concludes that an agency employee has performed his administrative duties improperly, and such administrative duties affect the quality of services to the public.

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Explanation: Clauses (A) and (B) of section 104.080 may be satisfied. However, the public's legitimate interest in information relating to the quality of services of a public agency will normally outweigh the potentially embarrassing nature of the disclosure. An employment relationship between an employee and the agency will not normally preclude the agency from disclosure of this information.

- (D) Disclosure of embarrassing information contained in an affidavit filed in court in connection with a law suit.
- (E) Disclosure of embarrassing information which has recently been published in a local newspaper of general circulation.

Explanation: Clause (A) of section 104.080 is not satisfied in examples (D) and (E) because the information in example (D) is a public record and the information in example (E) is common knowledge.

104.110: Disclosure Constituting an Unwarranted Invasion

Disclosure to the public of personal data in the following situations is normally an unwarranted invasion of personal privacy:

- (A) Disclosure of information from the records of a client.

Explanation: Clauses (A), (B) and (C) of section 104.080 are normally satisfied. Any legitimate public interest can be served by aggregating data in statistical form.

- (B) Disclosure of the resume of or evaluative materials on an applicant for employment by the Department.

Explanation: Clauses (A), (B) and (C) of section 104.080 are normally satisfied with regard to such information if disclosure is potentially embarrassing or offensive. However, in some situations, for example, where the applicant seeks a particularly high-level position and the information is relevant to the applicant's ability to carry out the responsibilities of this position, the legitimate public interest in disclosure may outweigh the embarrassing nature of the disclosure, in which case disclosure may not constitute an unwarranted invasion of privacy.

- (C) Disclosure of embarrassing information concerning the personal life of an employee where such information is marginally related to the ability of the employee to carry out the responsibilities of his position.

Explanation: Normally, clause (A), (B) and (C) of section 104.080 are satisfied. In this example the public's legitimate interest in disclosure does not outweigh the embarrassing nature of the disclosure.

104.120: Disclosure to Investigative Agents of the Attorney General or the State Ethics Commission

The Department may give access to personal data it holds to authorized investigative agents of the Attorney General or of the State Ethics Commission acting in furtherance of their official duties.

104.130: Disclosure of Records of Deceased Applicants and Recipients

An officer shall be designated pursuant to 106 CMR 102.010 to receive all requests for records of deceased applicants and recipients or other information concerning deceased applicants and recipients, and to determine whether each such request constitutes an unwarranted invasion of personal privacy. In making a determination, the officer shall apply the general criteria set forth in 106 CMR 104.080 through 104.110. In addition, the officer shall:

- (A) ascertain the purpose for which the information is requested and determine whether that purpose is reasonably necessary and one that serves the public interest;
- (B) ascertain the identity of the requester and determine whether that individual is an appropriate party to be seeking the information for the stated purpose;
- (C) attempt to identify and notify the next of kin or other close relatives of the decedent, including parents, siblings, or children, and afford them the opportunity to submit reasons why they believe the disclosure is not reasonably necessary or does not serve the public interest;
- (D) make a determination as to whether the requester's purpose can be achieved without disclosing the requested information; and
- (E) complete an audit trail, in accordance with 106 CMR 103.060, for those requests which are approved. Documentation of the request and the approval shall be included in the deceased applicant's or recipient's file.